A **MALAYSIAN TRADE UNION CONGRESS & ORS**

v.

MENTERI TENAGA, AIR DAN KOMUNIKASI & ANOR

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
C HASAN LAH FCJ
[CIVIL APPEAL NO: 01(f)-6-03-2013(W)]
12 FEBRUARY 2014

CIVIL PROCEDURE: *Locus standi - Judicial review - Test in*
D *Government of Malaysia v. Lim Kit Siang - Whether applicable - Infringement of private right - Whether established - Action against Minister's refusal to disclose documents classified as "official secret" - Whether Minister's decision irrational - Whether applicant "adversely affected" by non-disclosure - Whether applicant has real and genuine*
E *interest in subject matter - Rules of the High Court 1980, O. 53 r. 2(4)*

The issue in this appeal centres on whether the test of *locus standi* as propounded in *Government of Malaysia v. Lim Kit Siang ('Lim Kit Siang')*, that an applicant must establish infringement of a
F private right or the suffering of special damage, still applies to an application for judicial review and to what extent, in light of O. 53 r. 2(4) of the Rules of the High Court 1980 ('RHC'). The facts of the case were that pursuant to privatisation of the services for the distribution and treatment of water for the State
G of Selangor, the Government of the State of Selangor, the Federal Government and Syarikat Bekalan Air Selangor ('SYABAS') entered into a tripartite agreement ('the concession agreement') whereby SYABAS was granted a 30 year concession to supply treated water to the State of Selangor and Federal Territory,
H according to the water tariffs provided therein. Under the concession agreement, SYABAS was entitled to increase of water tariffs if it managed to achieve a 5% reduction in non-revenue water. Subsequently, based on an audit report, the Minister announced that SYABAS had met the performance target and
I was eligible to a 15% increase in water tariffs. The first appellant, the Malaysian Trade Union Congress ('MTUC'), applied to the

Minister for a copy of the concession agreement and the audit report justifying the 15% increase in water tariffs but was refused by the Minister on the ground that the two documents were classified documents. Hence, MTUC and 13 others ('the second to 14 appellants') filed an application for judicial review for, *inter alia*: (i) a declaration that the appellants and/or general public have a right to have access to the audit report and the concession agreement; (ii) alternatively a declaration that the audit report and the concession agreement were public documents and not official secret documents; (iii) an order of *certiorari* to quash the decision of the Minister; and (iv) an order of *mandamus* directing the Minister to disclose the contents of the audit report and the concession agreement to the appellants and/or the general public. The application was granted by the Judicial Commissioner. However, the respondents had successfully appealed against the decision to the Court of Appeal. Hence, this appeal by the appellants, who submitted that the test in *Lim Kit Siang* was not applicable to judicial review proceedings and that the correct test to be applied is the "adversely affected" test. The respondents submitted that to prove that the appellants had substantive *locus standi* to the prayers of *certiorari*, declaration and *mandamus*, the appellants must show in the affidavit evidence that they have legal rights which have been infringed. It was contended that MTUC and the other appellants had not established that they had a fundamental or legal right to have access to the two documents. Thus, it was the respondents' case that the test in *Lim Kit Siang* is still applicable to determine the appellants' *locus standi* to bring the action. The respondents further contended that the decision made by the Minister to reject MTUC's application for access to the concession agreement was not irrational as it was premised on cl. 45 of the concession agreement and the audit report had been classified as "official secret".

Held (dismissing appeal with no order as to costs)
Per Hasan Lah FCJ delivering the judgment of the court:

(1) The "adversely affected" test, a single test for all the remedies provided under O. 53 of the RHC, was preferred by the court (*QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor*, foll). For an applicant to pass the "adversely affected" test, the applicant has to at least show that he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage. (paras 57 & 58)

(2) The second to the 14th appellants' dissatisfaction with the decision of the Minister in rejecting MTUC's application did not make them persons who were "adversely affected" by the decision falling within the ambit of O. 53. They were clearly strangers to the application. They had not satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC and as such, they were not entitled to the reliefs sought in their application. (para 59)

(3) Pertaining to the issue of whether MTUC was a person adversely affected by the Minister's decision to reject the application for disclosure of and access to the two documents, the court has to assess the applicant's claim to standing against the whole legal and factual context of the application. Apart from that, the court also has to consider the merit of the challenge, the importance of vindicating the rule of law, the importance of the issue raised and the likely absence of any other challenger. Based on the whole legal and factual context of the application especially the fact that this was public interest litigation, MTUC had shown that it had a real and genuine interest in the two documents and was thus adversely affected by the Minister's decision. (paras 60 & 64)

(4) MTUC was not denied outright access to treated water in breach of its alleged fundamental right. MTUC's cause of action was based upon its alleged right of access to documents that had been requested for. Its interest was only in the tariffs to be imposed in respect of water supplied. From the affidavit evidence, it had not been shown that the water tariffs imposed or to be imposed were excessive and there was unreasonable profiteering by SYABAS. The increase in the water tariff had been approved by the Cabinet after taking into consideration the audit report. (paras 62 & 63)

(5) In s. 2 of the Official Secrets Act 1972, "official secret" meant any document specified in the Schedule and any information and material relating thereto. The documents specified in the Schedule include Cabinet documents, record of decisions and deliberations including those of Cabinet committees. The audit report was an official secret document on the ground that it was tabled before and deliberated by the Cabinet in its meeting and hence, was a Cabinet document. (para 68)

(6) Clause 45 of the concession agreement prohibited the respondents from disclosing its contents to a third party without the agreement of the other parties. Therefore, the Minister was not wrong in his decision in not disclosing the contents of the agreement to a third party. As a party to the agreement, the second respondent was also bound by the contractual terms of the agreement. At the time when the Minister made the decision, there was no indication from the Selangor State Government and SYABAS that they were prepared to disclose the contents of the concession agreement to MTUC. Only at the trial of the case before the High Court did the Selangor State Government and SYABAS informed the High Court that they were prepared to disclose the concession agreement to the appellants. (paras 69 & 71)

(7) In the circumstances of the case, only MTUC had the *locus standi* to bring the action as it was adversely affected by the Minister's decision not to disclose the two documents. However, MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the ground of procedural impropriety. Hence, MTUC was not entitled to obtain the reliefs sought. (paras 72 & 73)

Bahasa Malaysia *Translation Of Headnotes*

Isu dalam rayuan ini berkisar tentang sama ada ujian *locus standi* yang dikemukakan dalam kes *Government of Malaysia v. Lim Kit Siang ('Lim Kit Siang')*, bahawa seseorang pemohon perlu membuktikan perlanggaran hak peribadi atau mengalami kerugian khas, masih boleh digunapakai kepada permohonan semakan kehakiman dan setakat mana, menurut A. 53 k. 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Fakta kes adalah, berikutan penswastaan perkhidmatan pengedaran dan rawatan air bagi Negeri Selangor, Kerajaan Negeri Selangor, Kerajaan Persekutuan dan Syarikat Bekalan Air Selangor ('SYABAS') memasuki perjanjian tiga pihak ('perjanjian konsesi') di mana SYABAS diberikan konsesi bagi 30 tahun untuk membekalkan air yang dirawat ke Negeri Selangor dan Wilayah Persekutuan, menurut kadar tarif air yang diperuntukkan di dalamnya. Di bawah perjanjian konsesi tersebut, SYABAS berhak meningkatkan kadar tarif air jika ia berjaya mencapai pengurangan 5% dalam kadar air tidak berhasil. Kemudian, berdasarkan laporan audit, Menteri mengumumkan bahawa SYABAS telah mencapai sasaran prestasi

dan oleh itu, berhak menerima 15% peningkatan dalam kadar tarif air. Perayu pertama, Kongres Kesatuan Sekerja Malaysia ('MTUC'), memohon kepada Menteri untuk salinan perjanjian konsesi dan laporan audit yang menjustifikasikan peningkatan 15% dalam kadar tarif air tetapi ditolak oleh Menteri atas alasan bahawa kedua-dua dokumen tersebut diklasifikasikan sebagai dokumen sulit. Dengan itu, MTUC dan 13 yang lain (perayu-perayu kedua hingga ke 14) memfailkan permohonan semakan kehakiman untuk, antara lain: (i) deklarasi bahawa perayu-perayu dan/atau masyarakat umum diberikan hak untuk mengakses laporan audit dan perjanjian konsesi tersebut; (ii) secara alternatifnya, laporan audit dan perjanjian konsesi tersebut adalah dokumen-dokumen umum dan bukan dokumen-dokumen rahsia rasmi; (iii) perintah *certiorari* untuk membatalkan keputusan Menteri; dan (iv) perintah *mandamus* mengarahkan Menteri mendedahkan kandungan laporan audit dan perjanjian konsesi kepada perayu-perayu dan/atau masyarakat umum. Permohonan tersebut dibenarkan oleh Pesuruhjaya Kehakiman. Walau bagaimanapun, responden-responden telah berjaya dalam rayuan terhadap keputusan tersebut ke Mahkamah Rayuan. Maka, rayuan ini oleh perayu-perayu, yang menghujahkan bahawa ujian dalam kes *Lim Kit Siang* tidak terpakai kepada prosiding semakan kehakiman dan ujian yang betul untuk digunapakai adalah ujian "kesan buruk". Responden-responden menghujahkan bahawa untuk membuktikan perayu-perayu mempunyai *locus standi* kepada permohonan *certiorari*, deklarasi dan *mandamus*, perayu-perayu mesti menunjukkan dalam keterangan afidavit bahawa mereka mempunyai hak di sisi undang-undang dan hak tersebut telah dilanggar. Adalah dihujahkan bahawa MTUC dan perayu-perayu lain tidak membuktikan bahawa mereka mempunyai hak asasi atau undang-undang untuk mendapat akses kepada kedua-dua dokumen tersebut. Oleh itu, adalah kes responden-responden bahawa ujian dalam kes *Lim Kit Siang* adalah masih digunapakai untuk menentukan *locus standi* perayu-perayu untuk memulakan tindakan. Responden-responden selanjutnya menghujahkan bahawa keputusan Menteri menolak permohonan MTUC untuk akses kepada perjanjian konsesi adalah rasional kerana ia berdasarkan kepada kl. 45 perjanjian konsesi dan laporan audit telah diklasifikasikan sebagai "rahsia rasmi".

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)

Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Ujian "kesan buruk", satu-satunya ujian bagi kesemua remedi yang diperuntukkan di bawah A. 53 KMT, adalah lebih diutamakan oleh mahkamah (*QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor*, diikuti). Bagi seseorang pemohon berjaya dalam ujian "kesan buruk", pemohon tersebut perlu sekurang-kurangnya menunjukkan bahawa dia mempunyai kepentingan nyata dan tulen dalam hal perkara tersebut. Pemohon tidak perlu membuktikan pencabulan hak persendirian atau mengalami kerugian khas.

(2) Ketidakpuasan hati perayu-perayu kedua hingga ke-14 dengan keputusan Menteri dalam menolak permohonan MTUC tidak menjadikan mereka pihak-pihak yang mengalami "kesan buruk" daripada keputusan tersebut yang terangkum dalam A. 53. Mereka jelas asing kepada permohonan tersebut. Mereka tidak memenuhi ujian ambang *locus standi* di bawah A. 53 k. 2(4) KMT dan dengan itu, mereka tidak berhak kepada relif-relif yang dipohon dalam permohonan mereka.

(3) Berkenaan dengan isu sama ada MTUC mengalami kesan buruk oleh keputusan Menteri menolak permohonan untuk pendedahan dan akses kepada kedua-dua dokumen tersebut, mahkamah perlu menilai tuntutan pemohon terhadap keseluruhan konteks undang-undang dan fakta permohonan. Selain daripada itu, mahkamah juga perlu mempertimbangkan merit cabaran tersebut, kepentingan mewajarkan peraturan undang-undang, kepentingan isu yang dibangkitkan dan kemungkinan tiadanya apa-apa cabaran lain. Berdasarkan keseluruhan konteks undang-undang dan fakta permohonan, khususnya fakta bahawa ini adalah litigasi kepentingan umum, MTUC telah menunjukkan bahawa ia mempunyai kepentingan sebenar dan tulen dalam kedua-dua dokumen tersebut dan oleh itu terkilan dengan keputusan Menteri.

(4) MTUC tidak dinafikan sama sekali akses kepada air terawat yang melanggar hak asasinya. Kausa tindakan MTUC adalah berasaskan kepada hak akses ke atas dokumen yang telah

dipohon. Kepentingannya adalah hanya dalam kadar tarif yang dikenakan berkaitan dengan air yang dibekalkan. Daripada keterangan afidavit, tidak ditunjukkan bahawa kadar tarif air yang dikenakan atau akan dikenakan adalah berlebihan dan terdapat pencatutan tidak munasabah oleh SYABAS. Kenaikan kadar tarif air telah diluluskan oleh Kabinet selepas mempertimbangkan laporan audit.

(5) Dalam s. 2 Akta Rahsia Rasmi 1972, "rahsia rasmi" bermaksud apa-apa dokumen yang dinyatakan dalam Jadual dan apa-apa maklumat dan material berkaitan dengannya. Dokumen-dokumen yang dinyatakan dalam Jadual termasuk dokumen-dokumen Kabinet, rekod keputusan dan perbincangan termasuk oleh jawatankuasa Kabinet. Laporan audit adalah dokumen rahsia rasmi atas alasan bahawa ia telah dikemukakan di hadapan dan dibincangkan oleh Kabinet dalam mesyuaratnya dan dengan itu, adalah dokumen Kabinet.

(6) Klausa 45 perjanjian konsesi menghalang responden-responden daripada mendedahkan kandungannya kepada pihak ketiga tanpa persetujuan pihak-pihak yang lain. Oleh itu, Menteri tidak salah dalam keputusannya untuk tidak mendedahkan kandungan perjanjian tersebut kepada pihak ketiga. Sebagai pihak kepada perjanjian tersebut, responden kedua juga terikat dengan terma-terma kontrak perjanjian. Semasa Menteri membuat keputusannya, tiada petunjuk daripada kerajaan negeri Selangor dan SYABAS bahawa mereka bersedia untuk mendedahkan kandungan perjanjian konsesi tersebut kepada MTUC. Hanya semasa perbicaraan kes di hadapan Mahkamah Tinggi, Kerajaan Negeri Selangor dan SYABAS memberitahu mahkamah bahawa mereka bersedia untuk mendedahkan perjanjian konsesi tersebut kepada perayu-perayu.

(7) Dalam keadaan kes, hanya MTUC mempunyai *locus standi* untuk memulakan tindakan kerana ia terkilan dengan keputusan Menteri untuk tidak mendedahkan kedua-dua dokumen tersebut. Walau bagaimanapun, MTUC gagal menunjukkan bahawa keputusan Menteri adalah tidak sah, tidak rasional dan salah disebabkan kesalahan prosedur. Dengan itu, MTUC tidak berhak memperoleh relif yang dipohon.

Case(s) referred to:

AG of Quebec v. Irwin Toy Limited [1989] 1 SCR 927 ***(refd)***
Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***
Ex p Queenpeace Ltd (No. 2) [1994] 4 All ER 329 ***(refd)***
Ex p World Development Movement Ltd [1995] 1 WLR 836 ***(refd)***
Gouriet v. Union of Post Office Workers & Ors [1978] AC 435 ***(refd)***
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 CA ***(refd)***
Ministry of Public Safety and Security (Formerly Solicitor General) and AG of Ontario v. Criminal Lawyers' Association & AG of Canada & 15 Others (Intervener) [2010] 1 SCR 815 ***(refd)***
Onus v. Alcoa of Australia Ltd (1981) 149 CLR 27 ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(foll)***
R v. Inland Revenue Commissioners (Ex p National Federation of Self-Employed and Small Business Ltd) [1982] AC 617 ***(refd)***
R v. Shayler [2003] 1 AC 247 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
S P Gupta v. Union of India [AIR] 1982 SC 149 ***(refd)***
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 1 LNS 2 FC ***(refd)***
The Commonwealth of Australia v. John Fairfax & Sons Ltd [1980] 147 CLR 39 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78
Federal Constitution, art. 8
Official Secrets Act 1972, s. 2A
Rules of the High Court 1980, O. 53 rr. 1, 2(4), 3

English Supreme Court Rules 1977, O. 53 r. 3(7)

Other source(s) referred to:

Clive Lewis, *Judicial Remedies in Public Law*, 2000, para 10-009, fn 22
De Smith's Judicial Review, 6th edn, para 2-031
MP Jain & SN Jain, *Principles of Administrative Law*, 6th edn, p 1994

For the appellants - Malik Imtiaz Sarwar (Jenine Gill, Aliff Benjamin Suhaimi, Joanne Chua Tsu Fae & Pavendeep Singh with him); M/s Thomas Philip
For the respondents - Suzana Atan (Shamsul Bolhassan with her); SFC

[Editor's note: For the Court of Appeal judgment, please see Menteri Tenaga, Air Dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors [2012] 9 CLJ 858; for the High Court judgment please see Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Ors [2010] 6 CLJ 291.]

Reported by S Barathi

JUDGMENT

Hasan Lah FCJ:

Introduction

[1] This appeal centres on the test of *locus standi* as propounded by the then Supreme Court in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12. Leave to appeal was given by this court on 30 January 2013 for the appellants to appeal against the majority decision of the Court of Appeal dated 25 February 2011 wherein the respondents' appeal against the entire decision of the learned Judicial Commissioner dated 28 June 2010 was allowed.

[2] The issue is put before this court in the form of the following question:

> Whether the test of *locus standi* propounded by the Supreme Court in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 ie, that an applicant must establish infringement of a private right or the suffering of special damage still applies to application for judicial review, and to what extent, in light of the present Order 53 Rule 2(4) of the Rules of High Court 1980.

Background Facts

[3] Historically, until 15 March 2002, the Selangor Water Supply Department had been responsible for the distribution and treatment of water for the State of Selangor. On 15 March 2002, however, these services were privatised whereby the distribution and treatment components were separated. The distribution aspect was taken over by Perbadanan Urus Air Selangor Bhd ("PUAS")

while the treatment aspect was taken over by a consortium comprising Puncak Niaga (M) Sdn Bhd ("Puncak Niaga"), Konsortium Abass Sdn Bhd and Syarikat Pengeluar Air Sungai Selangor Sdn Bhd ("SPLASH"). A

[4] PUAS suffered a loss of about RM2 billion and was unable to meet its commitments. The Government of the State of Selangor asked for financial aid from the Federal Government, but the request was rejected. B

[5] In September 2004 it was announced that Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS") would take over PUAS and the Federal Government would provide financial assistance of RM2.9 billion to SYABAS. At this juncture Puncak Niaga held 70% interest in SYABAS, whilst Kumpulan Darul Ehsan Berhad, a company owned by the Selangor Economic Development Corporation, held the remaining 30%. C D

[6] On 15 December 2004 the Government of the State of Selangor, the Federal Government and SYABAS entered into a tripartite agreement ('the concession agreement') whereby SYABAS was granted a 30-year concession to supply treated water to the State of Selangor and the Federal Territory, according to the water tariffs provided therein. Under the Concession Agreement, SYABAS was entitled to increase the water tariffs if it managed to achieve a 5% reduction in the non-revenue water. E F

[7] Subsequently, SYABAS applied for an increase of the water tariffs by 15%. This increase in water tariffs was based on an audit report, which allegedly confirmed that SYABAS had achieved a 5% reduction in the non-revenue water. Sometime in October 2006 the Minister had announced that SYABAS had met the performance target and was eligible to a 15% increase in water tariffs with effect from 1 November 2006. G

[8] The Malaysian Trade Union Congress ("MTUC"), a society of trade unions, applied to the Minister for a copy of the concession agreement and the audit report justifying the 15% increase in water tariffs. The Minister refused to do so on the ground that the two documents were classified documents. H

[9] MTUC and 13 others (the second to 14th appellants in this appeal) filed an application on 15 January 2007 for a judicial review for the following reliefs: I

A (a) a declaration that the appellants and/or general public have a right to have access to the audit report and the concession agreement;

(b) alternatively, a declaration that the audit report and the
B concession agreement are public documents and not official secret documents;

(c) an order of *certiorari* to quash the decision of the Minister in denying the appellants access to the audit report and the concession agreement; and
C

(d) an order of *mandamus* directing the Minister to disclose the contents of the audit report and the concession agreement to the appellants and/or the general public.

D **[10]** The grounds given by the appellants pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ("RHC") to support their application are as follows:

(a) the decision of the Minister denying them access to the two documents was unreasonable;
E

(b) the Minister had failed to consider relevant considerations and considered irrelevant considerations; and

(c) there was a breach of art. 8 of the Federal Constitution
F which required the Minister to act reasonably and in failing to give reasons for his decision, contrary to the appellants' legitimate expectation that the Minister would act in a responsible manner.

G **[11]** On 28 June 2010 the learned Judicial Commissioner granted an order in terms of all the prayers prayed for by the appellants in the judicial review application together with costs.

[12] On appeal, the Court of Appeal, by a majority decision allowed the respondents' appeal with costs.
H

Decision Of The Learned Judicial Commissioner

[13] In allowing the appellants' application the learned Judicial Commissioner held that the appellants had the *locus standi* to bring
I the action as they were persons "adversely affected" by the decision of the Minister.

[14] Secondly, the concession agreement could not be treated as confidential document as its contents had already been circulated by the media and other parties. Further, the concession agreement contained no information detrimental to national security or public interest. As it was not a private document and was executed with public interest in mind, it was in the public interest for the concession agreement to be disclosed.

[15] Thirdly, with regard to the audit report, the High Court found that the audit report did not contain information detrimental to national security or public interest and it was not a classified document under s. 2A of the Official Secrets Act 1972 ("the Act").

[16] Fourthly, it was held that the Minister's refusal to disclose the two documents was made without taking into consideration the legitimate expectation of members of the public affected in the decision-making process to be treated fairly.

[17] Fifthly, it was held that the use of the Act in this case by the respondents was disproportionate and against the principles of good governance, accountability and transparency.

Decision Of The Court Of Appeal

[18] The majority *inter alia* held that MTUC had satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC as it was adversely affected by the decision of the Minister to reject its request for access and disclosure of the two documents.

[19] With regard to the second to 14th appellants it was held that they had not satisfied the threshold *locus standi* as they had not made a similar request to the Minister for access and disclosure of the two documents. On this ground alone it was held by the majority that the application by the second to 14th appellants should have been dismissed.

[20] The majority further held that although MTUC was "adversely affected" by the Minister's decision, it had not shown that it had a fundamental or legal right to have access to the two documents and that those rights had been infringed. In the majority's view this was not a case where MTUC or its members had been denied outright access to treated water in breach of

their alleged fundamental right but an alleged right of access to documents that had been requested for. It is also the majority's view that in Malaysia, members of the public had no right of access to documents relating to the operation of government departments and documents that were in the possession of government Ministers or agencies.

[21] The majority also held that the High Court erred in granting the order of *certiorari* to MTUC without determining whether MTUC had any legal right to the two documents or the Minister had acted in breach of MTUC's legal right in denying access to those documents.

[22] The minority, on the other hand, held that the appellants were adversely affected by the Minister's refusal to disclose the contents of the two documents because as consumers of the treated water in Selangor, the increase in water tariffs, which was triggered by the concession agreement and the audit report would have an adverse impact on them. It was also held that the audit report was not protected by the Act because there was no evidence that it had been classified as official secret under the Act prior to it being produced before the Cabinet. With regard to the concession agreement the minority held that the Minister could not rely on cl. 45 of the concession agreement to reject the appellants' application for the document as the State Government of Selangor and SYABAS had no objection to the disclosure of the document.

[23] The minority also held that the disclosure of the document was in the public interest and the Minister had been empowered to direct the same.

[24] The minority further held that the appellants also had a legitimate expectation as members of the public, who were affected in the decision making process, to be treated fairly.

Submission Of The Appellants

[25] Learned counsel for the appellants submitted that the test in *Lim Kit Siang* is not applicable to judicial review proceedings. The correct test to be applied is the "adversely affected" test. This test calls for a flexible approach that is directed to determining whether the applicant falls within the factual spectrum that is covered by the words "adversely affected".

[26] In support of his submission learned counsel for the appellants provided the following reasons. Firstly, the test in *Lim Kit Siang* was not propounded in respect of judicial review proceedings. The claim brought by Mr Lim Kit Siang was in private law. Secondly, the framework for judicial review was changed by the amendments to the RHC in 2000 where the single test of *locus standi* as provided under O. 53 r. 2(4) of the RHC for all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 is that any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[27] Thirdly, the Malaysian courts have recognised the need for the law to remain relevant to achieve the objective of the law. In support of that proposition learned counsel cited the following observation made by Eusoffe Abdoolcader SCJ in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 at p. 179:

> It might not perhaps be inappropriate to make some observations on the *locus standi* rule in relation to injunctions and declarations. We refer to *Lim Cho Hock v. Government of the State of Perak & 2 ors* [1982] 2 MLJ 148, 149 to 151 and accept and approve the discussion in the judgment in that case (at pages 149-151) on the question of *locus standi* and endorse the concept of liberalizing the scope of individual standing. Even if the law's pace may be slower than society's march, what with increased and increasing civic consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels. It would not perhaps be inapt to aphorize that the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom. In the United States of America, where standing rules are relatively lax, it had been found that although the gates have been open there has been no flood.

[28] Fourthly, the "adversely affected" standard is consistent with the test for *locus standi* adopted in other jurisdictions.

[29] Learned counsel for the appellants further submitted that the aim of the determining *locus standi* at the hearing (substantive *locus standi*) is altogether different as the court is more concerned with the exercise of its remedial discretion. The test is as such employed

A in a different manner and is aimed at determining sufficient interest by assessing the applicant's claim to standing against the whole legal and factual context of the application. It was submitted that the "sufficient interest" test is no different from the "adversely affected" test as it is currently understood in this country.

B

[30] On the appellants' *locus standi*, learned counsel for the appellants submitted that the minority opinion of Mohd Hishamudin JCA was to be preferred as the learned Judge approached the matter in the manner propounded by the Court C of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, and by reference to the matter at hand being a matter of public interest.

[31] As regards the second to the 14th appellants learned counsel for the appellants submitted that it was not necessary for these D parties to have made an application of their own to the Minister to be adversely affected as they were similarly, *albeit* indirectly, affected by the refusal of the Minister to disclose what was in actual fact information that ought have been made public for the benefit of all Malaysians.

E

[32] On the issue relating to the right to access information within the Federal Government's possession the appellants contended that it is posited that the freedom of information is implicit in, or is a derivative of, the freedom of expression. In F support of that proposition the appellants cited a passage from the judgment of this court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 and cases from other jurisdictions such as *R v. Shayler* [2003] 1 AC 247, *S P Gupta v. Union of India* [AIR] 1982 SC 149, *AG of Quebec v. Irwin Toy* G *Limited* [1989] 1 SCR 927 and *Ministry of Public Safety and Security (Formerly Solicitor General) and AG of Ontario v. Criminal Lawyers' Association & AG of Canada & 15 Others (Intervener)* [2010] 1 SCR 815.

H **[33]** Based on the foregoing learned counsel for the appellants contended that as long as there is no statute that justifies the suppression of the information sought, the respondents must disclose the same. A citizen is therefore entitled to access to information concerning the workings of government save where

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access is precluded by law. It was also submitted that the disclosure of the two documents is necessary for the meaningful exercise of free expression on matters of public interest.

[34] As regards the audit report learned counsel for the appellants submitted that the document was not an "official secret" under the Act as the document was not a Cabinet document.

[35] As regards the concession agreement learned counsel for the appellants submitted that the respondents' reliance on cl. 45 of the concession agreement, which provided for confidentiality of the document, as the basis to avoid disclosure was unjustified as the other two parties to the concession agreement namely the Selangor State Government and SYABAS were prepared to disclose the concession agreement to the appellants and in addition, the critical parts of the concession agreement had been in circulation in media and analysts' commentaries on the matter.

[36] On the question posed in this appeal learned counsel for the appellants submitted that the question ought to be answered in the negative.

[37] Learned Senior Federal Counsel for the respondents submitted that to prove that the appellants have substantive *locus standi* to the prayers of *certiorari*, declaration and *mandamus*, the appellants must show in affidavit evidence that they have a legal rights and that such legal rights have been infringed. It was contended that MTUC and the other appellants had not established that they had a fundamental or legal right to have access to the two documents. In other words, the respondents' case is that the test in *Lim Kit Siang*'s case is still applicable to determine the appellants' *locus standi* to bring this action.

[38] Learned Senior Federal Counsel also submitted that for the reliefs sought to be allowed, it is important to ascertain whether the decision made by the Minister is illegal, irrational or tainted with procedural impropriety. In support of that proposition she cited the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. It was contended that the decision made by the Minister to reject MTUC's application for access to the concession agreement was not irrational as it was premised on cl. 45 of the concession agreement.

[39] With regard to the audit report it was contended that the Minister had correctly rejected MTUC's application because the document had been classified as "official secret". The courts should not usurp the power of the Minister with regard to the classification of the document as official secret.

Decision Of This Court

[40] On the issue of *locus standi*, the learned Judicial Commissioner held as follows:

> From the above statements, I agree with learned counsel for the applicants' contention that the applicants are persons "adversely affected" and not "busy bodies, cranks and other mischief makers" by the decision of the 1st respondent. Each and every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the 1st respondent's. I, therefore hold the applicants have established they had a *locus standi* to bring this action.

[41] In the Court of Appeal, the majority decision of the Court of Appeal applied the test as propounded in *Lim Kit Siang*'s case to determine whether the appellants had *locus standi* to bring this action. In her judgment Zaleha Zahari JCA (as she then was) said:

> Applying the principle enunciated by the Supreme Court decision in *Lim Kit Siang*, I am of the view that the learned Judicial Commissioner's approach of linking parties to the subject matter based on the English criteria of *locus*, which has different provisions, was misconceived. The requirement in Malaysia of having to establish a legal right under the law, a breach of such legal right which adversely affected the rights of such a person, effectively restricts public interest litigation.

In respect of the 2nd to 14th Applicants I am of the view that these Applicants had no *locus standi* under O. 53 of the Rules to file an application for judicial review. These Applicants dissatisfaction with the decision of the Minister in rejecting MTUC's application does not make them persons who were "adversely affected" by the Minister's decision falling within the ambit of O. 53. They were clearly strangers to the said application. The question of the 2nd to 14th Applicants being wrongly deprived of a fundamental or legal right does not accordingly arise. On this ground alone I am of the view that the application of the 2nd to 14th Applicants should have been dismissed.

Whilst MTUC may be considered to fall within the term "adversely affected" by reason of the Minister's refusal of their application, according to the law, to clothe them with *locus*, MTUC must establish that they have a fundamental right or a legal right (see *Lim Kit Siang*'s case) to have access and disclosure of the Audit Report and the Concession Agreement and that those rights had been infringed.

The cause of action here is not a case of denial of access to water, but an alleged right of access to documents that had been requested for. The Applicants' interest clearly was in the tariffs to be imposed in respect of water supplied. This has been dealt with in paragraphs 30 and 31 of my brother, Abu Samah Nordin's, JCA's judgment.

[42] In his judgment Abu Samah JCA (as he then was) said:

[16] There is no doubt in my mind that MTUC has satisfied the test of threshold *locus standi* under Order 53 r. 2(4) of the RHC as it is adversely affected by the decision of the Minister who had rejected its request for the public disclosure of the Agreement and the Audit Report and for access to them.

[17] The rest of the respondents, however, had not shown that they were "adversely affected" by the decision of the Minister as none of them had made a similar request to him for the disclosure of and access to the Agreement and the Audit Report. They had not, therefore, in my judgment, satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC and whatever reliefs granted by the High Court must therefore be set aside.

...

A [29] In my view MTUC had not shown that it comes within any of the categories referred to by the Federal Court in *Tan Sri Othman Saat*'s case. For instance, MTUC had not shown that it has a statutory right to the Concession Agreement and the Audit Report or a breach of a statute which affects its interest substantially or that it has some genuine interest in having its legal position declared.

B

[31] This is not a case where MTUC or its members had been denied outright access to treated water in breach of its alleged fundamental right.

C

[43] On the other hand Mohd Hishamudin JCA, who gave a dissenting judgment, held that the appellants had the *locus standi* as they were adversely affected by the refusal of the Minister to disclose the contents of the two documents. The learned judge gave seven grounds to support his conclusion.

D

[44] As mentioned earlier what is in issue in this case is the substantive *locus standi* and not the threshold *locus standi*. The distinction between the threshold and the substantive *locus standi* has been clearly stated by the Court of Appeal in *Ketua Pengarah*

E *Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253 at p. 276; [1997] 3 MLJ 23 at pp. 40 and 41 as follows:

In public law – and, in so far at least as the appellants in the

F first and second appeal are concerned, the summons in the present instance lies in public law – there are two kinds of *locus standi*. The first is the initial or threshold *locus standi*: the second is the substantive *locus standi*.

Threshold *locus standi* refers to the right of a litigant to approach

G the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts.

H Although a litigant may have threshold *locus standi* in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive *locus standi*. The factors that go to a denial of substantive *locus standi* are so numerous and wide ranging that it is inappropriate to attempt an

I effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuse declaratory or injunctive relief.

[45] It is also useful to refer to the following observation by Lord Diplock in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617; [1985] 1 QB 657:

> The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or "threshold," stage is regulated by rule 3. The application for leave to apply for judicial review is made initially *ex parte*, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether "it considers that the applicant has a sufficient interest in the matter to which the application relates." So this is a "threshold" question in the sense that the court must direct its mind to it and form a *prima facie* view about it upon the material that is available at the first stage. *The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself*. (emphasis added).

[46] It is also important to note that the framework for judicial review was changed by the amendments to O. 53 of the RHC in 2000. Order 53 r. 1 and 2 provide:

> 1. (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.
>
> (2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.
>
> 2. (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form IIIA.
>
> (2) ...
>
> (3) ...
>
> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[47] With regard to the new O. 53 the Court of Appeal made the following observation in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 at pp. 705 and 706:

> ... It must not be forgotten that O. 53 in its present form was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. Two points may be noted when considering our present O. 53. First, that it begins by referring to the powerful and enabling provision introduced for the first time in our law by Parliament in para. 1 of the Schedule to the Courts of Judicature Act 1964...
>
> To return to the construction to be given to O. 53, I turn to the second point I wish to make. It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank of America National Trust And Savings Association v. Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491. So here, a manifest injustice would occur if O. 53 is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy.
>
> I might add that under para. 1 of the Schedule to the Courts of Judicature Act 1964, which is drawn from art. 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case...

[48] In *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* (*supra*) at pp. 541 and 542 the Court of Appeal said:

> [16] It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v. Canada* [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about

to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example, *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich AIR* [1999] SC 3211, where, when granting leave, it was said:

> [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[49] In *Lim Kit Siang*'s case and *Tan Sri Haji Othman Saat*'s case the relief sought by the applicants was a declaration, which is a private law remedy. With regard to declaratory relief in public law proceedings the Federal Court in *Tan Sri Haji Othman Saat*'s case had this to say (at p. 179):

> The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though

A they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, *inter alia*, others are more directly affected, or the plaintiff himself is fundamentally not.

B **[50]** The law on *locus standi* as laid down in *Lim Kit Siang*'s case was based on the principle in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109, as approved in *Gouriet v. Union of Post Office Workers & Ors* [1978] AC 435. This is what Hashim Yeop A Sani SCJ said at p. 40 of the report:

C What then is the proper law to apply to determine the *locus standi* of the respondent here? In my opinion, the principle in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109, as approved in *Gouriet v. Union of Post Office Workers & Ors* [1978] AC 435 is still the law applicable in this country. Buckley J propounded the law as follows:

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> A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ...; and secondly, where no private right is
E interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

In my view, we ought also to apply the common law principle enunciated in *Boyce* by virtue of s. 3 of the Civil Law Act 1956.

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[51] *Gouriet*'s case was distinguished in the House of Lords case of *National Federation*. The general conclusion to be drawn from *National Federation*, as summarised by Abdoolcader SCJ in *Lim Kim Siang*'s case at p. 43 of the report, is that the majority thought
G the issue of standing should usually be considered along with the merits, as it is now a matter for the court's discretion - the graver the illegality, the less insistence on showing standing. The majority distinguished *Gouriet*'s case on the basis it concerned only private law. At pp. 657-658 of the report of *National Federation* Lord
H Roskill observed:

> But *Gouriet*'s case was a relator action and was not concerned with prerogative orders of judicial review, and the relevant observations of your Lordships must be read in the light of that fact and of the subsequent enactment of Order 53 (of the English
I Rules of the Supreme Court).

[52] In the instant case the appellants made the application under O. 53 of the RHC to seek remedies which are classified as public law remedies. In *Gouriet*'s case Lord Wilberforce said that in applications for prerogative writs by individuals the courts have allowed them "liberal access under a generous conception of *locus standi*."

[53] It is to be noted that the test in *Lim Kit Siang*'s case was not propounded in respect of judicial review proceedings. The claim brought by Mr Lim Kit Siang was in private law. Hence the *Boyce* test, as opined by the majority in the *National Federation*, is not applicable to such proceedings.

[54] The courts, both local and foreign, have recognised the need for the law to remain relevant to achieve the objective of the law. The English courts, over the years, had adopted a more liberal approach especially in matters of public interest (see *De Smith's Judicial Review*, 6th edn., para. 2-031; *Ex p World Development Movement Ltd* [1995] 1 WLP 836; *Ex p Queenpeace Ltd (No. 2)* [1994] 4 All ER 329).

[55] In *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27, Stephen J made the following observation with regard to the test for standing for federal purposes in Australia:

> ... (T)he criterion of "special interest" supplies no such rule. As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter.

[56] In India, the Indian judicial approach on standing has "veered towards liberalisation of the *locus standi* as the courts realise that taking a restrictive view on this question will have many grievances unremedied" (see '*Principles of Administrative Law*', MP Jain & SN Jain, (6th edn.) at p. 1994).

[57] In view of the foregoing we are of the view that the view expressed by the Court of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* (*supra*) that the "adversely affected" test was a single test for all the remedies provided for under O. 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative.

[58] However, we are not prepared to accept the appellants' argument that the "sufficient interest" test under O. 53 r. 3(7) of the English Supreme Court Rules 1977 is no different from the "adversely affected" test under O. 53 r. 2(4) of the RHC as the two tests do not have the same meaning. Therefore, in determining the *locus standi* to sue, the court has to exercise caution in applying the English cases. In our view for an applicant to pass the "adversely affected" test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[59] We now deal with the issue of whether the second to the 14th appellants are persons adversely affected by the Minister's decision to reject the first appellant's application for the disclosure of and access to the two documents. They did not make a similar request to the Minister for the disclosure of and access to the two documents. We agree with the majority's view that their dissatisfaction with the decision of the Minister in rejecting MTUC's application did not make them persons who were "adversely affected" by the Minister's decision falling within the ambit of O. 53. They were clearly strangers to the said application. In our view they had not satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC and as such they were not entitled to the reliefs sought in their application.

[60] We now turn to the issue of whether MTUC is a person adversely affected by the Minister's decision to reject the application for the disclosure of and access to the two documents. At this stage, which concerns with the substantive *locus standi*, the court is more concerned with the exercise of its remedial discretion. The court has to assess the applicant's claim to standing against the whole legal and factual context of the application. Other factors which the court has to consider at this stage as suggested by case law are the merit of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other challenger (see *Ex p World Development Movement Ltd* [1995] 1 WLR; *Ex p Queenpeace Ltd (No. 2)* [1994] 4 All ER 329 at 349-50 cited in *Judicial Remedies in Public Law* (2000) by Clive Lewis in para. 10-009, fn 22).

[61] MTUC claimed that it and/or the public are entitled to the two documents on the basis that the government is under a responsibility to provide safe and affordable treated water; water being an inalienable and basic right to human existence and living; there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised; and they have a legitimate expectation that the government shall at all times ensure that its people has affordable access to treated water.

[62] We agree with the observation made by the majority that this is not a case where MTUC was denied outright access to treated water in breach of its alleged fundamental right. MTUC's cause of action was based upon its alleged right of access to documents that had been requested for. Its interest was only in the tariffs to be imposed in respect of water supplied. We would also like to mention here that from the affidavit evidence it had not been shown that the water tariffs imposed or to be imposed were excessive and there was unreasonable profiteering by SYABAS. What had been proved was that the water tariff was reviewed and increased by 15% in November 2006. MTUC claimed that there was no transparency in the review as the basis of the review was questionable.

[63] From the respondents' affidavit it had been shown that the audit report had been considered by the Cabinet on 11 October 2006. This means the increase in the water tariff had been approved by the Cabinet after taking into consideration the audit report. The Ministry's letter dated 4 December 2006 at pp. 428 to 429 of the appeal record says:

> 3. Walau bagaimanapun, keputusan Laporan Audit tersebut telah dibentangkan kepada Jemaah Menteri dan telah dipersetujui. Laporan audit tersebut juga telah mengesahkan bahawa SYABAS telah berjaya mencapai sasaran pengurangan NRW sebanyak 5% yang telah ditetapkan dan mereka layak untuk menikmati kenaikan tariff yang berkuat kuasa mulai 1 November 2006.

[64] Looking at the whole legal and factual context of the application especially the fact that this is a public interest litigation, we are of the view that MTUC had shown that it had a real and genuine interest in the two documents. Hence, MTUC was adversely affected by the Minister's decision.

[65] We now deal with the issue of whether the reliefs sought ought to be granted. The grounds for judicial review, as laid down by this Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* (*supra*) are illegality, irrationality and procedural impropriety which means, the court in practice is permitted to scrutinise a decision not only for process but also for substance.

[66] Learned Senior Federal Counsel contended that the decision made by the Minister was not illegal, irrational or tainted with procedural impropriety. In response to the application by MTUC to gain access to both the concession agreement and the audit report, the respondents in paras. 5-7 of the affidavit affirmed by Japar bin Abu on 18 January 2008 said as follows:

> 5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan "SULIT" berasaskan Klausa 45 Perjanjian Konsesi di mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada perjanjian tersebut.
>
> 6. ...
>
> 7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai "RAHSIA" kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat "Rahsia" di bawah Jadual kepada seksyen 2A Akta Rahsia Resmi, 1972.

[67] The majority was of the view that the audit report was an "official secret". On the other hand, the minority held that the audit report was not protected by the Act. The respondents asserted that the audit report was tabled and deliberated in the Cabinet meeting on 11 October 2006 and as such it is a "Cabinet document" within the meaning of the Schedule and by virtue thereof the document was an "official secret" pursuant to s. 2 of the Act.

[68] Under s. 2 of the Act "official secret", *inter alia*, means any document specified in the Schedule and any information and material relating thereto. The documents specified in the Schedule include Cabinet documents, record of decisions and deliberations

including those of Cabinet committees. On the facts of this case we agree with the majority's view that the audit report was an official secret document on the ground that it was tabled before and deliberated by the Cabinet in its meeting on 11 October 2006. It was a Cabinet document under the Schedule to the Act. We are therefore unable to agree with the minority's view that the audit report would not automatically become an official secret document the moment it was tabled before the Cabinet.

[69] With regard to the concession agreement the respondents did not rely on the Act in refusing to disclose the document. The respondents' case was that they were prevented from disclosing the document by reason of cl. 45 of the concession agreement which restrained disclosure to any third party without prior mutual agreement of the parties. At the trial of the case before the High Court the Selangor State Government and SYABAS informed the High Court that they were prepared to disclose the concession agreement to the appellants.

[70] In the Court of Appeal the majority concluded that the Minister was justified in his decision by virtue of cl. 45 of the concession agreement. Zaleha Zahari JCA held that in light of the said clause the Minister's decision was not irrational. Mohd Hishamudin JCA was of the view that the Minister could no longer rely on cl. 45 of the concession agreement to refuse the disclosure of the document as the Selangor State Government and SYABAS were prepared to disclose the document. He also took into consideration the public interest dimension of the dispute and opined that disclosure of the concession agreement was in the public interest and the Minister had been empowered to direct the same. In support of that he cited the decision of the High Court of Australia in *The Commonwealth of Australia v. John Fairfax & Sons Ltd* [1980] 147 CLR 39.

[71] Clause 45 of the concession agreement prohibited the respondents from disclosing its contents to a third party without the agreement of the other parties. As such we agree with the majority's view that the Minister was not wrong in his decision in not disclosing the contents of the agreement to a third party. As a party to the agreement the second respondent was also bound by the contractual terms of the agreement. At the time when the Minister made the decision there was no indication from the

A Selangor State Government and SYABAS that they were prepared to disclose the contents of the concession agreement to MTUC. In any event, as a party to the agreement, the second respondent had the right not to agree to disclose the contents of the agreement to a third party.

B

[72] As mentioned earlier the grounds given by MTUC pursuant to O. 53 r. 3 of RHC are that the Minister's decision was unreasonable, he had failed to consider relevant considerations and there was a breach of art. 8 of the Federal Constitution. On the C facts of this case, we find MTUC had failed to establish those grounds to support its application. In other words MTUC failed to show that the Minister's decision was illegal, irrational and flawed on the ground of procedural impropriety.

Conclusion

D

[73] Only MTUC has the *locus standi* to bring this action as it was adversely affected by the Minister's decision not to disclose the two documents. However, on the facts and the law applicable MTUC was not entitled to obtain the reliefs sought for. This E judgment is given pursuant to s. 78 of the Courts of Judicature Act 1964 as Hashim Haji Yusoff FCJ, a member of the panel, has since retired. For the reasons given we dismiss the appeal. In view of the fact that this is a public interest litigation there should be no order as to costs at all levels and we so order.

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